No. 77-1351

In the Supreme Court of the United States

OCTOBER TERM, 1977

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION AFL-CIO, PETITIONER

v.

JOHNS-MANVILLE PRODUCTS CORPORATION and NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Johns-Manville Products Corporation ("the Company") manufactures at its New Orleans plant organic felt, a crude form of paper. The Company's approximately 107 production and maintenance employees have for many years been represented for collective bargaining purposes by petitioner ("the Union") (Pet. 3; Pet. App. 63a).

During bargaining negotiations for a new contract in September 1973, the Company experienced an increase in paper breaks from an average of 3 to 8 per week to an

average of 15 to 20 per week (Pet. App. 5a, 63a, 78a-82a).[1] Attributing the increased disruption of production to employee sabotage, the Company, on October 31, locked out its employees (Pet. App. 51a, 82a-86a, 88a, 97a). Two weeks later the Company resumed partial operations, using temporary replacements and employees loaned from its other plants (Pet. App. 52a). In the latter part of March 1974, with the negotiations between the Company and the Union continuing at an impasse, the Company decided, without notifying the Union, to hire permanent replacements for its regular employees (Pet. App. 52a, 90a, 103a). The entire work force was permanently replaced by mid-June 1974 (Pet. App. 52a).

2. The Board, Member Jenkins dissenting, held that in light of the production disruptions and the bargaining impasse, the Company's lockout and temporary replacement of its employees were based on "a legitimate and substantial business purpose without antiunion motivation," and thus those actions did not violate Section 8(a) of the National Labor Relations Act, 61 Stat. 140, 29 U.S.C. 158(a). (Pet. App. 54a-55a, 56a-59a). The Board unanimously concluded, however, that the Company did violate Section 8(a)(1), (3) and (5) by permanently replacing the entire complement of regular employees following their lawful lockout (Pet. App. 52a-53a). In so holding, the Board rejected the Company's argument that the instances of sabotage and disruption of production constituted concerted employee activity that justified the permanent replacement of the locked out employees on

[1]During the production process, breaks in the paper can be caused by striking the paper sheet with an object or finger, by varying the correct ratio of water to fiber in the product, or by improper operation of the production machinery (Pet. App. 62a-63a).

the ground that they had engaged in an in-plant strike within the meaning of *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240.[2]

The Board ordered the Company, *inter alia*, to offer the locked out employees reinstatement to the positions they had held on the date the Company began the permanent replacement of its work force; to make them whole for any loss of earnings; to bargain with the Union; and to post appropriate notices (Pet. App. 101a-109a).

3. The court of appeals, Judge Wisdom dissenting, declined to enforce the Board's order. The majority, purporting to adopt the Board's factual findings, nonetheless held "that, as a matter of law, the employees were involved in what amounted to an in-plant strike. * * * [Therefore] the Company's subsequent lock-out and hiring of permanent replacements were not violative of the National Labor Relations Act * * *. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333" (Pet. App. 12a-13a). The court added that this conclusion "precludes the necessity of [reaching] * * * the question of whether an employer may permanently replace locked out employees after bargaining impasse" (Pet. App. 14a-15a).

Judge Wisdom dissented on the ground that "the Court's holding is both factually and legally erroneous" (Pet. App. 17a). He found that "the facts do not show a strike by anyone. Instead, the record shows that substantial evidence supports the conclusion of the administrative law judge and the National Labor

[2]Both the Administrative Law Judge and the Board concluded that, in the absence of any company investigation of the incidents, the record did not support the conclusion that any or all of the employees were engaged in improper conduct (Pet. App. 53a, 97a).

Relations Board that the company identified no workers as actually connected to any misconduct justifying replacement or dismissal" (Pet. App. 24a). He added that the court's holding that "a strike occurred as a matter of law" was "unprecedented" and unsupported by either prior decisions or labor policy considerations. "Both law and policy compel the conclusion reached by the Board that action may not be taken against in-plant strikers until the participating workers are identified." (Pet. App. 24a-25a.)[3]

4. The Board believes that the court below erred in holding that the occurrence of some disruption in the Company's operations during collective bargaining negotiations constituted an in-plant strike that permitted the Company to hire permanent replacements for all of its bargaining unit employees, even though there was no proof that any of the employees had engaged in any disruptive activities.[4] For the reasons stated in the petition (Pet. 8-11) and by Judge Wisdom (Pet. App. 24a-31a), that holding is contrary to decisions of this Court and of the courts of appeals, which have uniformly held that only those employees who are shown to have been guilty of unlawful or unprotected activities may be discharged (Pet. 10). However, in view of the unusual factual circumstances of this case and the large number of other

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[3]Given this conclusion, Judge Wisdom found it necessary to resolve the question whether an employer may permanently replace lawfully locked out employees. He agreed with the Board that such employer action violates the Act. (Pet. App. 32a-46a.)

[4]The second question raised in the petition (Pet. 2)—whether the Company, in furtherance of its bargaining position, was entitled not only to lock out its employees, but to replace them permanently with new hires—is not ripe for review since the majority of the court below did not consider that question (p. 3, *supra*).

Labor Board cases already pending before the Court, it was determined not to file a Board petition for certiorari in this case. Should the Union's petition for certiorari be granted, the Board will defend its decision and order.

Respectfully submitted.

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